Public Access to the Shoreline: The Rhode Island Example

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NOAA/Sea Grant

University of Rhode Island
Marine Reprint No. 108

Reprinted from *Coastal Zone Management Journal* 4 (1/2):65-81 (1978)

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10/78-250

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Abstract Competition for the use of our nation's shoreline has produced a thorough analysis of means to accommodate the increased demands of the public for access to the shore. The issue of public access in Rhode Island is considered at three levels. First, Rhode Island cases involving common law doctrines, such as the public trust, dedication, and so forth, are examined for their relevance. Second, the effect of the federal government in Rhode Island through the Coastal Zone Management Act and its amendments is studied. Finally, two types of state management programs are considered—a Commission for the Discovery of Rights of Way and the Coastal Resources Management Council.

The extent of public access to the shoreline has long been a controversial issue in coastal states; Rhode Island is no exception. A substantial body of case law has examined the rights and obligations of those who seek access to the shore. An analysis of common law principles and doctrines sets the stage for state and federal government action on the access issue.

The federal government's major role in this area began with the Coastal Zone Management Act of 1972. Amended in 1976, the Act now places special emphasis on planning for public access and provides funds for acquiring access areas.

Rhode Island's interest in the access issue considerably predates the federal government's discovery of the shoreline. A special commission was established in 1958 to discover and preserve existing rights-of-way to the shore. Today, the Coastal Resources Management Council is planning for access as well as the most effective way to use acquisition funds.

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Coastal Zone Management Journal, Volume 4, Numbers 1/2
0090-8339/78/0501-0065/$2.00/0

The traditional battle between shoreline property owners and the public who seek access to the shoreline continues, but new laws are slowly changing the nature of the struggle.

Legal Status of Access at Common Law

The Public Trust Doctrine

The basic principle of the public trust doctrine is that some property rights in certain lands can never be alienated from the general public.[1] One rationale for the doctrine is that certain resources are so important their protection is essential in a free society. The benefits of these resources to society as a whole outweigh any private property interests.[2]

The Supreme Court of the United States relied on the public trust doctrine in the landmark *Illinois Central Railroad v. Illinois* decision.[3] In that case, the Illinois state legislature had granted "all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan" to the Illinois Central Railroad.[4] The effect of this grant was to place control of the entire harbor of the city of Chicago in the hands of the Illinois Central Railroad. The Supreme Court held that the grant to the railroad was a "substantial impairment of the interest of the public in the waters"[5] and therefore violated the public trust doctrine. The court emphasized the special character of the lands under navigable waters.[6] Unlike that of other state-held land, "it is a title held in trust for the people of the state . . . freed from the obstruction or interference of private parties."[7] The decision places a heavy burden on the states to protect the public's rights against the encroachments of private parties.

Rhode Island has long recognized the public's right to the foreshore and submerged lands. A provision that acknowledges the public trust doctrine was included in the state constitution:

> The people shall continue to enjoy and freely exercise all the rights of fishery, *and the privileges of the shore*, to which they have been heretofore entitled under the charter and usages of this state. (Art. 1, Sect. 17, *italics added*)

In 1970, during the period of heightened awareness of our environment, the following clauses were added to further delineate the state's role in protecting the public interest:

> . . . and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their value; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to

> protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the state and for the preservation, regeneration and restoration of the natural environment of the state.

This constitutional provision is a good general statement of the public trust doctrine, but it leaves unanswered many important questions. For example, what did the constitutional framers mean by "privileges of the shore"? What physical area in this context is meant by the term "shore"? Legislative ambiguities often have to be clarified by the courts, and this provision was no exception.

The case of *Jackvony v. Powel*,[8] decided in 1941, examined this element of the constitution when it determined that passage *along* the shore is one of the "privileges of the shore." The first important clarification made by the court was to define its vocabulary. The court found that the term "shore" referred to the land between high- and low-water marks, and that the term "beach" applied to that area of land that lies between the high-water mark and the beginning of the upland.[9] Hence, the "privileges of the shore" could only be exercised in the narrow strip of land covered and uncovered by the tides.

The court next examined which common law "privileges" became "rights" after the enactment of the constitution. Because of a lack of Rhode Island case law on the subject, the court examined those rights "frequently claimed by the public or described by authors who have discussed the law pertaining to rights in the shore."[10] The court concluded that there were at least four common law rights that should be recognized:

1. Fishing from the shore
2. Taking seaweed from the shore
3. Leaving the shore to bathe in the sea
4. Passage along the shore

The right of passage along the shore was upheld in Jackvony, but no mention was made of any right of access to the shore from the upland area. The right of access would seem to be a logical corollary of the right of passage. *Angell on Tidewaters*[11] states:

> It has indeed been not infrequently suggested, that the law would not allow to every man the right to fish in the sea . . . and at the same time deny to him the means of getting there . . . .

However, historical evidence, which the Rhode Island courts have relied upon heavily in the past, points heavily toward the opposite conclusion. *Angell on Tidewaters*, which the Rhode Island Supreme Court has called

> . . . a work which embodies the results of accurate research and discriminating judgment, and which must be considered good authority as to the law of Rhode Island from the earliest times[12]

states that there is no general right of access flowing from rights exercisable on the shore once one has arrived.[13] Therefore, the public trust doctrine, if construed strictly through historical means, will not provide a right of access to the shore in Rhode Island. However, it requires that the state at least maintain the shore in trust for public use, and the state may not abdicate this responsibility.[14]

The public trust doctrine is clearly a valuable starting point; used in conjunction with other methods, e.g., dedication, prescription, or custom, it could prove an effective tool in an effort to gain greater public access to the shoreline.

Dedication

As noted earlier, the effectiveness of the public trust doctrine in expanding public access to the shore is limited; while preserving the freedom of the shoreline itself, the dry sand area above the hightide line may still be effectively cut off from the public. One possible way to open the beach up to the public is through the common law doctrine of dedication. This doctrine provides that "the owner of an interest in land can transfer to the public either ownership, or a privilege of use, of such interest for a public purpose."[15] The owner reserves no rights incompatible with the full enjoyment of the public use. A dedication is in the nature of a donation of an owner's land to the public for the public use without consideration.[16]

The essential elements of the doctrine include an offer by the owner, express or implied, to donate a permanent interest in land for the public use as well as an acceptance of the offer, express or implied, by the public. A dedication is express when made by an oral declaration or by a deed or note; it is implied when there is acquiescence by the owner in public use or when some act or conduct of the owner manifests an intention to devote the property to public use.[17]

Rhode Island courts have taken the view that there must be either words or conduct on the part of the owner that reasonably tend to demonstrate such an intention to dedicate.[18] They have stated that it is essential to a valid dedication that there be a manifested intent by the owner to dedicate the land in question for the use of the public as well as an acceptance by the proper authorities or by the general public.[19]

The tough issue in each dedication case is determining what is meant by "manifested intent" to dedicate. If some positive act were required, the doctrine would have little scope. However, in the case of *Daniels v. Almy*, the Rhode Island Supreme Court found that the intent of the owner to dedicate may be

inferred from the silence of the owner and his acquiescence in the public use.[20] This gives the doctrine the potential for much broader application.

This technique of finding intent through acquiescence in the public use was used successfully in the case of *Talbot v. Town of Little Compton*.[21] The property in question was a 1000-ft stretch of beach containing slightly more than 2 acres. Talbot, the plaintiff, alleged that she held the title to the property and brought a bill in equity for the purpose of obtaining a decree to restrain a continuing trespass to the real estate. The plaintiff had attempted to post the land as private, but the town sergeant, at the direction of the town council, entered the property and removed the signs that forbade trespass.

In deciding whether Talbot had "acquiesced in the public use," the court made the following findings.

In favor of Talbot's claim to possession were the facts that

1. A continuous claim of title could be traced back to 1849.
2. In 1865 a fence was briefly erected on the property.
3. Previous owners objected once or twice to the taking of sand and gravel from the beach.
4. Talbot occasionally cleared up rubbish and bathed on the beach.

In finding acquiescence in public use, the court relied on the following facts in support of the town's argument:

1. The town openly carted gravel from the beach for the town's roads.
2. The town regularly cleared the beach of rubbish.
3. The town removed stones from the road across the land.
4. Local farmers carried away much sand.
5. Town inhabitants often used the beach in great numbers for hunting, fishing, and bathing.
6. All the above was done under a claim of right.

The court concluded that there might have been some question if only an occasional load of sand and gravel had been taken from the beach, but the amount taken by the town was so large and the taking was so regular and for such a long period of time that any person having a claim of title, if he gave any attention whatever to the matter, would have known the use was hostile and under a claim of right. The court found that such a long and continuous use raises a *presumption* of dedication which Talbot did not overcome; thus the title to the land in question vested in the municipality in trust for the inhabitants and the public.

The *Talbot* case demonstrates the effectiveness the doctrine of dedication can have in increasing public access to the shoreline. Its disadvantages are that it must be used on a case-by-case basis and the factual burden of showing public use to demonstrate the owner's acquiescence can be difficult to prove. However, of the four common law doctrines considered here, dedication, when used in conjunction with the public trust doctrine, has the greatest potential for increasing access to the shoreline.

Easement by Prescription

Another means that could be used to increase public access to the shoreline is the easement by prescription. Simply stated, an easement in property law is a right, distinct from ownership, that permits using the land of another in some way. It is a permanent interest in another's land, with a right to enjoy it fully and without obstruction. An easement can be created by grant, purchase, or prescription. Outright grants of right-of-way easements are rare; obtaining easements by purchase is most often prohibitively expensive. To create a right-of-way easement by prescription in Rhode Island, the proof must show that the use has been general, uninterrupted, continuous, and adverse (for the prescriptive period of 10 years[22]) to warrant the inference that it has been laid out by the proprietors of the adjoining land to the public.[23]

The burden of proving a right-of-way is upon the person claiming it.[24] Because of the Rhode Island Supreme Court's concern that a person's title to real estate remain free and unfettered, they have held an individual who seeks to establish an easement upon the land of another to a high degree of proof.[25] The court has also held that occasional use by people living in the vicinity of the proposed right-of-way without any assertion of public right is not sufficient.[26]

An examination of a particular case using this method will demonstrate the Rhode Island Supreme Court's reluctance to find an easement by prescription for shoreline access. In the case of *Daniels v. Blake*,[27] at issue was a strip of land over Blake's property which Daniels used to gain access to the Barrington River and then his boat. Since Daniels only used his boat, and consequently the path, during the summer, the court found that his use was only "occasional" and thus did not meet the "continuous" requirement. Evidence that others had used the path to gain access to the shore for clam digging was considered "indefinite" and was also only "occasional."

The greatest problem Daniels had, however, was in proving that his use was "adverse." Because the two parties were "friendly" while Daniels openly used the strip to pass to and from the shore, the court found that this tended to establish that the use was originally "permissive." This presumption of permissiveness, common in prescription cases in many jurisdictions, appears to rest on three grounds.[28]

First, apparently owners of open areas should not be expected to treat most uses as adverse and it would be unreasonable to require the owner to fence his land or guard against trespassers.[29] Second, it is generally felt that it would be unfortunate if owners were forced to exclude the public to preserve their rights. United States courts have affirmed that harmless trespasses should not be discouraged and that it would be unfair to penalize the generous owner.[30] A third reason is the general desire to protect private ownership and to allow for the development of land. This desire to protect private owners culminated in 1872 in Rhode Island with the passage of the following law[31]:

> Right of Footway Denied—No right of footway, except claimed in connection with a right to pass with carriages, shall be acquired by prescription or adverse use for any length of time.

This statute alone barred Daniels' claim of a prescriptive right of access; however, the court merely noted its presence and decided the case on the basis of the adversity issue.

The court found that occasional passing to and from the shore was not sufficient to put the titleholder on notice that such passing was an adverse use under a claim of right. They cited an observation in an earlier Rhode Island case, *Town of New Shoreham v. Ball*, to support their conclusion[32]:

> Nothing is more common in Rhode Island than for people to cross land lying along the bay to get to and from the shore, and it would hardly be possible for any occupant of such land to prove title by adverse possession, if such crossings would suffice to interrupt it.

Finally, after concluding that the original use had not been proved adverse, the court considered if Daniels' use could have become adverse at a later date. They found sufficient authority to conclude that an originally permissive use cannot be converted into an adverse use by a later use and claim of that kind. The law presumes that an originally permissive use continues in the absence of conduct, which clearly indicates a change.[34] And such permissive use cannot ripen into an easement no matter how long it continues.[35] Thus, Blake was permitted to close the alleged right-of-way to the public.

At this point, it is obvious that gaining a public easement by prescription for access to the shore is not easy. Under the right circumstances, however, the doctrine could still be used effectively. In many instances, adversity can be proved. The statute against easements by prescription for footpaths "unless claimed in connection with the right to pass with carriages" could be overcome with a showing that four-wheel-drive vehicles, for example, could and do use the right-of-way to the shoreline. With the steady increase in conflicts over access to

the state's shoreline, further attempts at gaining a public easement by prescription for access to the shore are likely.

Custom

Another common law doctrine that has been used with some success in increasing public access to the shoreline is the doctrine of custom. The law of customary rights has its origins in medieval England.[36] Inhabitants of feudal villages possessed rights in property before England had any method of recording these property interests. The doctrine of custom evolved from the supposition that holders of interests of property held for hundreds of years had legally acquired them and should therefore not be penalized, as no formal recording system existed at the time the rights were acquired.[37]

A customary right arose in favor of the public of a given community[38] and was historically limited to a small geographic location.[39] Only easements of use and passage were obtained by custom; the legal title of the land remained in the owner of record.[40] According to Blackstone's *Commentaries*, there are seven requisites of custom which must be established by the evidence in order for the custom to be recognized as law[41]: (1) antiquity; (2) continuity; (3) freedom from dispute; (4) reasonableness; (5) certainty; (6) obligation; and (7) consistency with the law.

The case that resurrected this doctrine and applied it to the subject of beach access is *State ex. rel. Thornton v. Hay*,[42] decided by the Oregon Supreme Court in 1969. The case involved a suit brought by the state against a motel owner who had fenced off part of the beach (to which he held title) beyond the hightide and below the vegetation line for use by motel patrons only. The court found that the dry sand areas of Oregon beaches had been enjoyed by the public under claim of right as an adjunct of the tidelands since the start of the state's history.[43] It held that this usage amounted to a valid custom that established public recreational rights in the beach without regard to the title of record held by private landowners.[44]

The use of custom to expand beach-access rights, however, comes up against two major problems in most states, including Rhode Island. First, very few state decisions in any jurisdiction have relied on custom. Prior to Thornton, it had only been applied in nineteenth century New Hampshire cases; Maine and Oregon decisions mention it in dicta; and early Connecticut, New Jersey, New York, and Virginia cases all disapproved of the doctrine.[45] The doctrine's use is therefore unfamiliar in the United States, and attempts to revive it must overcome the absence of case law and vitality.[46] Second, proving a public usage uninterrupted since the dawn of an area's political history is a far stiffer requirement than are those required for prescription and dedication. Moreover, private beachfront

development was just beginning in Oregon in 1969, which makes it easy to show public usage without private interference.[47] However, in states with long histories of intensive private ownership along the shoreline, such as Rhode Island, a showing of immemorial public usage may well be impossible.

The Federal Government and Access to the Shoreline

The federal government became directly involved with the issue of shoreline management and the concurrent problem of public access with the passage of the Coastal Zone Management Act of 1972.[48] The Act attempts to stimulate state leadership in planning and management of the coastal zone as well as bring into harmony the social, economic, and ecological aspects of land- and water-use decisions of more than local significance. Through a series of incentives centered on a federal grant program, the act attempts to encourage cooperation among various levels of government to achieve broad management goals.[49]

Because public access to the shoreline was not stated as a major goal in the original version of the Act, the federal government could only hope for state initiatives in that direction. In 1973, the Administrator of the Office of Coastal Zone Management, Robert Knecht, stated, "We will urge them (the coastal state governments) to set quantitative goals with respect to increased public access."[50] With only the power to "urge" available, the public access issue did not receive the attention many felt it deserved.

One solution to the access problem was promoted by Congressman Robert Eckhardt (D—Tex.) in the form of a "National Open Beaches Act." Eckhardt introduced various forms of this bill in Congress each year from 1969–1975; the latest version, H.R. 1676, was introduced January 20, 1975 to the 94th Congress with 25 cosponsors. H.R. 1676 would deal with beach access problems in the following six ways.

1. The Act declares that beaches, used traditionally for fishing, commerce, and recreation, are "impressed with a national interest." Furthermore, the public would be given the right to use them as a "common" consistent with state and national conservation policies to the full extent that such public right may be extended without violating the property rights of littoral landowners, which remain protected by the constitution.
2. The Act would prohibit the erection of any barrier or obstruction along the shore that would tend to restrict public use of the beach.
3. Federal court access without regard to jurisdictional amount is provided for U.S. District Attorneys to establish and protect the

public right to beaches. In such a legal action, a showing that the area in question is a beach is *prima facie* evidence that there has been a prescriptive right to use it as a common has been imposed on the beach.

4. Federal research facilities would be made available to assist states in carrying out the purposes of the Act. This would presumably include legal advice from the Department of Justice.
5. Federal grants would be available for up to 66⅔% of the cost of planning, acquisition, or development of projects designed to secure the right of the public to beaches.
6. If a state has sufficiently protected its beaches it may be eligible for financial assistance for the development and maintenance of transportation facilities necessary in connection with the use of the public beaches.

In sum, the Act would accelerate the process of utilizing state theories for protection of their public beaches by declaring federal policy in their favor, by establishing favorable *prima facie* assumptions, and by bringing to the aid of the states all federal legal and technical expertise to establish the public right to use oceanfront lands back to the vegetation line.[51]

Hearings were held on an earlier form of the bill on October 25–26, 1973. Administration representatives presented a united front against the Open Beaches Bill. Secretary of the Interior Nathaniel Reed's remarks were representative of the administration viewpoint. Reed stated that the objectives of the Open Beaches Act could be accomplished under existing authority provided in the Coastal Zone Management Act of 1972. The view was that through effective management and efficacious use of their land-use regulatory authority as contemplated in that law, the states would be able to provide protection against further encroachment and to meet the need for preservation of our nation's beaches as part of the comprehensive land-use planning process for the coastal zone.[52]

The rationale behind the Open Beaches Bill is that in the past, relying on state action has led to a decrease in beach availability.[53] The means chosen to reverse this trend in the Open Beaches Bill, however, simply went too far. The bill would be very expensive, is quite vague, and is possibly unconstitutional.[54] Furthermore, the provision that prohibits the erection of any barrier or obstruction along the shore that would tend to restrict public use of the beach could paralyze all future development along the shoreline. The inflexible, national, "prohibition" would not permit states or local communities, or both, to decide that some obstructions to public usage (e.g., a sewage-treatment plant, a new

port terminal) are necessary and, indeed, worthwhile. Hence, although well intended, the Open Beaches Bill may have presented more problems than it would have solved.

A more moderate approach to the access problem is found in recent amendments to the Coastal Zone Management Act. Public Law 94-370, signed on July 26, 1976, is primarily concerned with the development of the Coastal Energy Impact Program, but it contains several amendments of critical importance to the access issue as well. Section 305(b) of the act, as amended, states that[55]:

> The management program for each coastal state shall include . . . a definition of the term "beach" and a planning process for the protection of, and access to, public beaches and other coastal areas of environmental, historical, esthetic, ecological or cultural value.

The Committee Report on Public Law 94-370 indicates that the addition of this new planning requirement in the program development (Sect. 305) process does not represent the addition of a brand new consideration into the process in which most states are presently engaged. Rather, the inclusion of this "implicit" planning element represents a decision to give specific emphasis and support for this area.[56]

The second public access amendment is Sect. 315, which provides 50% matching funds for acquiring lands "to provide for access to public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value, and for the preservation of islands."[57] To ensure that purchases made pursuant to this subsection are in harmony with the overall state management program, states must have substantially completed the access planning process required under Sect. 305(b)(7) before they become eligible to receive grants under Sect. 315.[58]

These two amendments represent a very significant addition to the law of public access. Program approval and management funds now depend *inter alia* on a state public access program. Matching funds are available to acquire further access areas. Together they make an excellent compromise solution; the existing void in federal law was filled without the "nationalization" of beaches required in the Open Beaches Bill.

One potential problem with the new amendments, however, is the amount of the matching funds available under Sect. 315. With the high cost of real estate in most coastal areas, many states may not be able to afford the 50% matching funds to acquire access areas. The 66⅔% grants available under the Open Beaches Bill would have been much more likely to stimulate a strong access acquisition program.

State Management Programs and Public Access

The Public Rights-of-Way Commission

In 1958 the Rhode Island legislature established a permanent Commission on Discovery and Utilization of Public Rights-of-Way[59] to prevent the loss of existing rights-of-way from lack of use. The commission consisted of seven unpaid members—one senator, two representatives, the director of public works, the director of natural resources, the executive director of the Rhode Island Development Council, and the attorney general.

During the past 18 years, the commission has utilized its powers and performed its duties with varying degrees of success. Its first duty was to carry on a continuing discovery of the public rights-of-way to the water areas of the state. The commission's major work in this regard was the publication of a report in 1970 that described 148 rights-of-way.[60] The report had its problems; Mr. Anthony Giangiacomo, commission chairman, later admitted that the report was inaccurate, misleading, and useless as a guide to the public.[61] In 1974, 20,000 copies of a revised map were published with 143 rights-of-way shown. Criticism of the new map was heavy. Mr. Monroe Allen, a commission member, stated that the map was "a fraud on the state."[62] His major objection to the map was that many of the sites listed were either nonexistent or inaccessible. The *Providence Journal* was in agreement[63]:

> . . . the unsuspecting outdoorsman could benefit from x-ray vision and knight's armor if he intends to journey to the water's edge by way of some of the 143 public paths identified on the state map.

However, Giangiacomo claimed that the primary purpose of the map was not to guide the unknowledgeable, but rather to provide residents of shore areas with a clear and legal definition of the public paths they may use in order to gain access to the water.[64] In this regard, the commission's work was a valuable first step.

The second duty given the commission was to define, mark, and enforce the opening of all discovered rights-of-way it considered feasible for public use. Marking rights-of-way with signs has met with tremendous local opposition throughout the commission's history. Initially, signs were posted which were quickly removed by vandals and adjacent property owners. Later, 3-ft concrete posts with bronze plates on top were buried flush with the ground to discourage removal. However, many of these have already been destroyed, and those that remain are difficult to locate.[65] Insufficient funding and workforce has slowed the replacement of the markers.

Another aspect of the legislation is that every state department that controls state-owned land close or adjacent to discovered rights-of-way was authorized to set out such land for public parking if the plan was endorsed by the governing

body of the local municipality. Without availability of adequate parking, use of the right-of-way is restricted to nearby landowners. The provision that plans for parking facilities must be submitted to local governments for approval gives the local property owners the opportunity to block any public intrusion into their private domains.

Finally, the commission was authorized to acquire and develop land for parking facilities in close proximity to rights-of-way. Two factors have prevented the commission from acquiring land for parking facilities: (1) Adjacent property owners force the price of the property up when they learn that the state wants to build a parking lot nearby; and (2) funding for the commission has averaged $10,000 per year for all activities, which leaves very little for acquisition.

On March 14, 1974, the *Providence Journal* editorialized[66]:

> . . . the Rhode Island public is entitled to use the shoreline for recreation. And after 16 years of the commission's work, performance hardly measures up to need, nor does it promise to serve the public adequately in the foreseeable future. . . it seems only reasonable to conclude that there must be a better way.[66]

One "better way," first suggested by commission member Monroe Allen, was to abolish the commission and turn the matter over to the Department of Natural Resources.[67] Commission Chairman Giangiacomo recently suggested substantially the same thing in a Final Report to the commission, the legislature, and the governor.[68] A bill was presented in the 1977 legislative session to transfer the commission's duties to the Department of Natural Resources, the State Properties Committee, and the Statewide Planning Program.[69] The reasoning behind the proposal appears to be sound. Most of the actual "discovery" work has been accomplished; the big problems that remain are the maintenance and further development of known access points. These require full-time staff, which Natural Resources could, and in fact are already, providing for right-of-way maintenance.

A disadvantage of the absorption by the larger agencies, however, is that the highly visible nature of the special commission will be lost. One real benefit from the commission's stormy history is that the relatively frequent publicity that surrounded its activities succeeded in informing and reminding the public about the rights-of-way issue. If incorporated into a large bureaucracy, the special flavor of the access issue may be lost.

The Coastal Resources Management Council

In 1969, at the peak of the environmental movement, the Natural Resources Group (an organization of interested citizens) recommended to the governor that

a state management mechanism be established to deal with the problems and the opportunities of Narragansett Bay.[70] After two years of committee work, the legislature passed a bill that created the Coastal Resources Management Council.[71]

The act declared a policy to "preserve, protect, develop, and, where possible, restore the coastal resources of the state . . . through comprehensive and coordinated long-range planning and management." The council was given jurisdiction over water areas below mean high water and over six specified land uses and activities when there is "reasonable probability of conflict with a plan or program for resources management or damage to the coastal environment." This authority was to take the form of a permit system.

Rhode Island anticipated the pressures on its coastal zone earlier than did most states; it became one of the first states to undertake comprehensive coastal zone management. It was not until the following year that the federal Coastal Zone Management Act was passed. Rhode Island became one of the first states to receive a planning grant from the federal program.

The primary responsibility of the council is to prepare a comprehensive management plan for all the resources of the state's coastal region and then ensure compliance with the plan through its permit procedure. The *Plan* addresses the issue of marine recreation and the problem of public access.[72] As a general policy, the council has stated its awareness of the need for increased opportunities for public access and recreation in the coastal region. Furthermore, the council will only permit recreational development in those instances that make the best use of scarce shorelines and that do not interfere with the public right of access to the shore. Thus the council has made it clear that at least when a recreational development is proposed, it will safeguard any public right of access.

In addition, although it has no legislative mandate to do so, the council recently formed a Subcommittee on Rights-of-Ways. Partially as a result of a networking agreement with the Department of Natural Resources, the subcommittee is investigating 15 rights-of-way within the town of Westerly. The investigation is being conducted to provide information for long-range planning and management goals.

The first step in the production of a comprehensive management plan was taken in August 1976 with the submission of a draft plan for informal comment to the state and to the Office of Coastal Zone Management. As a result of the comments offered, the initial work was revised and resubmitted as a draft plan during the summer of 1977.

The first draft of the plan, written prior to the public access amendments of the Coastal Zone Management Act, named all public rights-of-way "areas of par-

ticular concern'' that require preservation.[73] Now, with Sect. 305(b)(7) to consider, drafters of the plan are struggling to keep up with the ''shifting target'' of federal policy and must address this new emphasis in their revised plan.

The proposed rules, which implement the new amendments, clearly indicate the need for a tie between the planning process and the identification of areas to be acquired using access acquisition funds pursuant to Sect. 315(2).[74] This ''tie'' will almost certainly be stressed by the council in the revised plan with regard to the proposed Bay Islands Park System.[75] An integral part of the state recreation plan, the Islands Park has been designed to be readily accessible to all, regardless of income. Eleven proposed sites will vastly increase the public's access to the shoreline. The core of the park is composed of excess Navy holdings; acquisition costs for the remainder of the islands range from $2.5 to $3.0 million. The access acquisition funds provided in Sect. 315(2) could make the proposed park system a reality.

In sum, the public access amendments to the Coastal Zone Management Act will force the council to expand and clarify its access planning and management program. At the same time, the access acquisition funds could dramatically change the amount of shoreline accessible to the public.

Conclusion

The subject of public access has been examined at three very different levels. The common law remedies discussed may be used by a member of the public to protect a right of access. Although complex and manageable only on a case-by-case basis, they remain significant tools for protecting existing usages.

The federal government, through the Coastal Zone Management Act, regards the access issue as one of many uses that must be permitted—and now encouraged—along the shoreline. Program management and acquisition funds are reserved for states that lay their plans according to federal guidelines.

Finally, examination of the state management programs has demonstrated the problems in both discovering and maintaining individual rights-of-way and developing a management program to ensure continued access.

The Rhode Island example is a complex one; it presents a variety of potential alternatives to pursue in order to increase public access. Yet the diversity of levels on which to approach the access problem can only help provide a steady increase in access to the shoreline in Rhode Island.

Acknowledgment

This work is a result of research partially sponsored by the Coastal Resources Center, University of Rhode Island.

Notes

1. Note, Public Access to Beaches: Common Law Doctrines and Constitutional Challenges, 48 N.Y.U.L. REV. 369, 385 (1973).
2. For example, see Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 MICH. L. REV. 471 (1970); Note, The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine, 79 YALE L.J. 762, 764 (1970).
3. 146 U.S. 387 (1892).
4. *Id.* at 448.
5. *Id.*
6. See Note, Access to Public Municipal Beaches: The Formulation of a Comprehensive Legal Approach, 7 SUFFOLK L. REV. 936, 947 (1973).
7. 146 U.S. 387, 453–454 (1892).
8. 67 RI 218, 21 A2d 554 (1941).
9. *Id.* at 228, 21 A2d at 558.
10. *Id.* at 223, 21 A2d at 556, referring to such sources as *Gould on Waters* (1900), and Angell, *Treatise on the Right of Property in Tidewaters and in the Soil and Shores Thereof* (1847).
11. 2 *Angell on Tidewaters* 191 (1847).
12. *Carr V. Carpenter*, 21 RI 528, 531–532 (1901).
13. 2 *Angell on Tidewaters* 192 (1847); see also 3 *Gould on Water* 198 (1900).
14. Note, *supra* note 6 at 950.
15. 6 Powell, *The Law of Real Property* 934 at 361 (1972).
16. 2 Thompson, *Commentaries on the Modern Law of Real Property* 369 (1961).
17. 23 *Am. Jur. 2d* Dedication 1 (1965).
18. *Vallone v. City of Cranston*, Dept. of Public Works, 97 RI 248, 197 A. 2d 310 (1965).
19. *Id.*
20. 18 RI 244, 27 A. 330 (1893).
21. 52 RI 280, 160 A. 466 (1932).
22. 34-7-1, G.L.R.I.
23. *Jones on Easements*, 461; *Elliott on Roads and Streets*, 3rd ed., vol. 1, 194; cited in *Daniels v. Blake*, 81 RI 103, 99 A2d 7 (1953).
24. *Earle v. Briggs*, 49 RI 6, 139 A.499 (1927).
25. *Berberian v. Dowd*, 104 RI 585, 247 A.2d 508 (1968).
26. *Eddy v. Clarke*, 38 RI 371, 379, 95 A.851 854 (1915).
27. 89 RI 103, 99 A2D 7 (1952).
28. Degan, Public Rights in Ocean Beaches: A Theory of Prescription, 24 SYRACUSE L. REV. 935, 962 (1973).
29. See *Potter v. Magruder*, 260 Ky 214, 97 S.W. 732 (1906); *State ex rel. Shorett v. Blue Ridge Club* 22 Wash 2d 487, 156 P2d667 (1945).
30. See *Du Mez v. Dykstra*, 257 Mich 449, 241 N.W. 182 (1932); *Baker v. Normouch Assn.*, 25 NJ 497, 136 A2D 645 (1957); *Friend v. Halcombe*, 196 Okla 111, 162 P2D 1008 (1945).
31. 34-7-4, G.L.R.I.
32. 14 RI 566 (1884).
33. *Id.* at 571.
34. *Tefft v. Reynolds*, 43 RI 538, 113 A.787 (1921).
35. *Earle v. Briggs*, 49 RI6, 139 A.499 (1927).
36. 2 Blackstone, *Commentaries* 33.
37. *Post v. Pearsall*, 22 Wend. 425, 440–441 (N.Y. Ct. Err. 1839).
38. 2 Blackstone, *Commentaries* 263.
39. *Post v. Pearsall*, 22 Wend. 425, 440 (N.Y. Ct. Err. 1839).
40. Gray, *The Rule Against Perpetuities*, 576–579 (4th ed., 1942).
41. 1 Blackstone, *Commentaries* 75–78; for a complete analysis of each of the seven elements, see, Delo, The English Doctrine of Custom in Oregon Property Law: *State ex rel. Thornton v. Hay*, 1974, ENVIRONMENTAL LAW 383.

42. 254 Ore. 584, 462 P.2d 671 (1969).
43. *Id.* at 588, 462 P.2d at 673.
44. *Id.* at 597-599, 462 P.2d at 677-678.
45. McKeon, Public Access to Beaches, 22 STANFORD L. REV. 564, 583 (1970).
46. Comment, Public Rights and the Nation's Shoreline, 2 ELR 10184 (1972).
47. McKeon, *supra* note 45 at 585.
48. 86 Stat. 1280, 16 U.S.C. 1451-1464 (1972).
49. "Considering Coastal Zone Management," Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, (June 1975).
50. Hearings on H.R. 10394 and H.R. 10395, Public Access to Beaches, Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the Committee on Merchant Marine and Fisheries, 93rd Cong., 1st Sess., Ser. No. 93-25, at 88 (1973).
51. Eckhardt, A Rational National Policy on Public Use of the Beaches, 24 SYRACUSE L. REV 967, 985 (1973).
52. Hearings, *supra* note 50, at 9.
53. Hearings, *supra* note 50, at 42.
54. But see Black, The Constitutionality of the Eckhardt Open Beaches Bill, 74 COLUMBIA L. REV. 439 (1974).
55. Pub. L. No. 94-370, Sec. 305 (b) (7) (July 26, 1976).
56. Report on H.R. 3981, Coastal Zone Management Act Amendments of 1975, Before the Committee on Merchant Marine and Fisheries, 94th Cong., 2nd Sess., Ser. No. 94-878 at 46 (1976).
57. Pub. L. No. 94-370, Sec. 315 (2) (July 26, 1976).
58. *Supra* note 56 at 63.
59. 42-33-1 to 8, G.L.R.I.
60. Rhode Island Statewide Comprehensive Transportation and Land Use Planning Program, *Public Rights-of-Way to the Shore*, Providence, March 1970.
61. "Chairman Says Disband Board," *The Evening Bulletin*, March 31, 1976.
62. "Bay Right-of-Way Guide is Risky," *The Providence Journal*, March 10, 1974.
63. "Seeking Rights-of-Way? Bring a Machete," *The Providence Journal*, October 6, 1975.
64. *Id.*
65. *Supra* note 62.
66. "Access to the Shore," *The Providence Journal*, March 14, 1974.
67. *Supra* note 62.
68. Anthony Giangiacomo, *Rights-of-Way to the Shore—Final Report of the Chairman*, March 1976.
69. *Id.* at 7.
70. Natural Resources Group, *Report on Administration of Narragansett Bay* (1969).
71. 46-23-1 to 16 G.L.R.I.
72. State of Rhode Island, *Coastal Resources Management Council Plan—Policies and Regulations* at 48 (1975), chap. 12.
73. State of Rhode Island, *Coastal Resources Management Council—Management Program* 6.2-1(9) (1976).
74. Proposed Office of Coastal Zone Management Reg. 920.17, 41 Fed. Reg. 53418 (Dec. 6, 1976).
75. Coastal Resources Center, University of Rhode Island, *The Bay Islands Park: A Marine Recreation Plan for the State of Rhode Island* (1976).